SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1967

No. 1306

WILLIAM F. SCANLAN,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
a corporation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner, William F. Scanlan, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its judgment entered in the above entitled cause (Appendix 3).

I. PRELIMINARY STATEMENT AND STATEMENT OF REFERENCES HEREIN.

Petitioner is a citizen of the United States and of the State of California therein and petitions for review of the judgments of the Court of Appeals and of the District Court under review therein, upon the grounds that the respective judgments of said courts, should they become final, would deprive petitioner of a trial by jury as reserved to him by the Seventh Article of Amendment to the Constitution of the United States and Rule 38 (a), Rules of Civil Procedure, and would deny petitioner due process of law and equal protection of the law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States, and upon the further ground that said courts were and are without jurisdiction of the subject matter and of the parties to said action, excepting only in respect to the fourth cause of action upon antitrust claims arising under the laws of the United States in interstate commerce.

The judgment below is upon an appeal from a judgment of dismissal upon an order directing a defendants' verdict in a cause removed from the state court upon diversity grounds in an action by a wholesale beer distributor as against a brewer and others setting forth three cause of action (1) combination and acts in restraint of competition in violation of state statute and common law, (2) breach of distributor's contract by the brewer and (3) conspiratorial interference with plaintiff's contract and business relationships. Following removal of the cause to the District Court, a fourth cause of action invoking fed-

eral antitrust laws in respect to the facts of the first cause of action was added to the complaint.

The underlying order directed a verdict in favor of the corporate defendant as to all four of plaintiff's causes of action and, as to the defendant natural persons—as to the third (interference) cause of action, only—but did not direct verdicts in favor of the latter defendants as to the respective antitrust claims in which they were charged. However, the judgment has ordered dismissal of the entire cause as to all claims and defendant parties.

The motion for a directed verdict of the jury was joined with a motion to dismiss the case, in respect to equitable issues reserved for resolution by the trial court.

These motions (Appendix 4) did not state any ground of motion, nor advance any claim to any technical or specific defect in plaintiff's case in chief and the order granting the motion (Appendix 5) is also without specification of any kind (compare *Case-Swayne Co. v. Sunkist Growers, Inc.*, 386 U.S. ....., 19 L.ed.2d 621, 369 F.2d 449, 452-453).

References herein are generally as follows: to pleadings and filings in the clerk's record in the trial court as indicated in Volume I of the transcript of record, herein abbrievated as CT (with zeroes omitted in page references); to the reporter's transcript of oral proceedings (Volume II of the transcript of record, consisting of five volumes, continuously paginated 1 to 1250), as RT; to exhibits as PX and DX; to the State of California, as the

state; to the Business and Professions Code of the state, as the code; to the acts of the Congress relating to competition (20 Stats. 209; 38 Stats. 730; 49 Stats. 209, all as amended, 15 U.S.C. 1, et seq.) as the Sherman Act and Clayton Act; to the parties as petitioner and respondents, respectively; and to respondent Anheuser-Busch, Inc., sometimes as the brewery.

Unless otherwise indicated, emphasis, insertions and omissions in quotations herein are supplied by counsel.

II. STATEMENT AS TO JURISDICTION.

Jurisdiction of the court is invoked under section 1257 of title 28 of the United States Code and that of the District Court was asserted under 28 U.S.C. 1332 upon diversity of residence, although petitioner is a resident of the state and respondent natural persons are also residents of the state[1] (CT 2:6-29).

In respect of the fourth cause of action of the complaint, invoking the Sherman and Clayton Acts (15 U.S.C. 1, et seq.), jurisdiction of the trial court was invoked as to the cause of action under 15 U.S.C. 4 and 28 U.S.C. 1337.

Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. 1291.

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[1]Petitioner timely moved to remand (Appendix 6) for the reason that defendant natural persons were residents of the state and were independently liable under the first and third causes of action, which motion was denied (CT 601, 8-9-63).

III. STATEMENT OF THE CASE.

A. Relationship and Dealings of the Parties.

During May-September of 1961, petitioner and the brewery negotiated an oral agreement by the terms of which petitioner became the exclusive wholesale distributor of the beer products of the brewery within the County of San Joaquin of the state, a valid and binding contract under state law (*Burgermeister Brewing Corp. v. Bowman,* 227 C.A. 2d 274, 38 Cal. Rptr. 597). These beers were trademarked and known as Budweiser and Michelob. By reason of said agreement and its performance, petitioner became the owner of the good will in said trademark products and their purchase and resale (*Carey v. Kraft-Phenix Cheese Corp.,* 24 C.A.2d 517, 75 P.2d 540). Petitioner was at all times an independent contractor, independently licensed and purchased said beer for resale to his own account (*Simpson v. Union Oil Company of California,* 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051; *Speegle v. Board of Fire Underwriters,* 29 C.2d 34).

As a part of this agreement, petitioner purchased the business and certain physical properties of a partnership of the brothers Barosso, who had acted as the exclusive distributor of said brands of beer for the brewery in said county for many years, and employed the Barossos and certain of their employees as his employees. The making of this agreement transferred to petitioner the business, good will, and customer relations of said Barossos (*Falstaff Beer, Inc. v. C. I. R.,* 322 F.2d 744; *Handyspot Co. v. Buegeleisen,* 128 C.A.2d 191, 274 P.2d 938; Section 655 of the

Civil Code of the State of California; and Sections 14100, 14102 of the Business and Professions Code of the state).

At that time petitioner had for some years been such exclusive distributor in said county of the beer of a competitor of the brewery sold under the brand name of Hamm's.

In 1961, the brewery produced and sold a beer under the brand name of Busch Bavarian—but did not produce or sell this beer in California. As a condition to the agreement for petitioner's undertaking the distributorship of the brewery's beer, its negotiating officer represented that the brewery had no plans to introduce Busch Bavarian in petitioner's exclusive territory.

It is admitted that petitioner carried out his distributorship function and all his undertakings with a high degree of fidelity, efficiency and success to the brewery.

In 1963, the brewery determined to introduce its Busch Bavarian beer in California and in petitioner's area of operations therein. The distribution of the latter brand was offered to petitioner—but only on the condition he cease to purchase and resell Hamm's beer or set up a separate organization, warehouse, sales and service organization under his name and personal supervision and that he disassociate his name and principal participation from his existing distribution of Hamm's beer (Appendix 7).

Upon petitioner's declining to agree to either of such alternative conditions, the brewery agreed with

a partnership known as D. Dinubilo and Sons, an inactive but licensed beer distributor in said county, and the senior of said Barassos, to appoint said partnership as the exclusive distributor in said county for all its brands of beer and to refrain from continuing supplies of Budweiser and Michelob beers to petitioner.

Upon reaching the latter agreement, the brewery refused further supplies of beer to petitioner, said Barosso left petitioner's employment and became the active and principal sales representative of said partnership. At said time Barosso was a principal sales representative of petitioner and was in charge of petitioner's sales activities in the sale of so-called draft beer. The brewery's representatives and said Barosso solicited other of petitioner's important and trusted employees to leave his employment and join said partnership and Barosso in the distribution of the brewery's beers, but without success.

Immediately following the brewery's refusal to further supply petitioner with Budweiser and Michelob beers, the members of said partnership and Barosso, directly assisted by respondents, and the brewery's sales representatives, commenced to solicit petitioner's customers with whom said Barosso had dealt as petitioner's sales representative to secure them as customers for beer for the "new distributor" and to "switch" petitioner's customers for Hamm's beer to the brewery's beers in their current and future purchases of beer.

In addition to the conspiracy established in respect to respondents Anheuser-Busch, Inc., Flanigan, El-

liott, Newhouse, Barosso and Dinubilo, respondent Flanigan testified that he, acting on behalf of respondent Anheuser-Busch, Inc., made an agreement with Theo Hamm Brewing Company for the "switching" of Anheuser-Busch distributors of the respective brewers and of distributors' territories throughout California (see Abstract of Testimony, John Flanigan, Appendix 8).

It is admitted that Anheuser-Busch's Busch Bavarian beer was and is "in competition with Hamm's beer . . . being offered for sale in San Joaquin County" and

> ". . . Plaintiff and defendant Anheuser-Busch Brewing Company did not reach an agreement in respect to distribution of Busch Bavarian beer by plaintiff in San Joaquin County, on or before April 9, 1963, or at any other time. . . . On or about April 9, 1963, defendant Anheuser-Busch informed plaintiff that it would no longer sell Budweiser beer and Michelob beer to him for resale in San Joaquin County after May 1, 1963. . . . Commencing on or about May 1, 1963, defendant Anheuser-Busch commenced selling Budweiser beer, Michelob beer and Busch Bavarian beer to D. Dinubilo & Sons, a licensed beer wholesaler in San Joaquin County and ceased selling to plaintiff. Fred Barosso, formerly of Barosso Beverage Company and more recently employed by Scanlan Distributing Company, left the employment of Scanlan Distributing Company on or about April 12, 1963, and shortly thereafter became an employee of D. Dinubilo & Sons." (Pretrial Order, Facts Agreed Upon or Admitted, CT 426:1-8).

Petitioner commenced his action in the state court alleging such conduct (1) as violation of state anti-trust laws, (2) as a repudiation of his agreement with the brewery and (3) as unlawful acts of unfair competition to his injury—seeking damages and injunctive relief.

Upon service of process the served defendants, respondents herein, caused the removal of the cause to the District Court and petitioner moved to remand the cause on the ground of non-diversity of citizenship (Appendix 6).

Following removal, respondent restated his anti-trust claim as violative of the acts of the Congress relating to restraint of competition and re-noticed his motion for a preliminary injunction, which was denied.

Respondents moved for summary judgment, which was denied (Appendix 12).

The trial proceeded before the trial court sitting with jury and, upon submission of petitioner's case in chief (omitting detailed proof of damages by stipulation and order), respondents moved for a directed verdict upon all issues tried to the jury—joined with a motion for dismissal, in respect to the equitable issues (Appendix 4)—which motions were granted and the judgment of dismissal based thereon was entered (Appendix 5).

B. The Industry and Economic Background.

The business and economic background of this cause involves the wholesale distribution of beer to

licensed retailers in the state for resale to the consumers, with particular reference to the County of San Joaquin therein where petitioner principally operated and maintained his principal place of business in Stockton, California—the county seat of said county.

Respondent Anheuser-Busch, Inc. is a so-called "national" brewer and has maintained the largest volume of production and sale of beer in the United States and, in the relevant years, enjoyed sales in California of 6.8, 1961, 7.1, 1962, and 12, 1963, percent, respectively; and, among California brewers, was of the rank, in said years, of 7th in 1961 and 1962 and 4th in 1963.

We are indebted to the subsequently decided case of *United States v. Jos. Schlitz Brewing Company,* (USDC N.D. Cal. S.D. 253 F.Supp. 129, March 24, 1966, affirmed by the Court, 386 U.S. 37, 17 L.ed.2d 35), for a succinct analysis and summary of industry background, line of commerce, relevant market, relative positions in production and standing of breweries, distribution methods and other facts of judicial notice to which reference is made in lieu of restatement.

As summarized by the latter court, there have been at all relevant times, and will continue unabated, intense competition and trend toward concentration in the sale of beer in California.

California is recognized in the industry as a separate submarket for the production and sale of beer

and accounted, in 1963, for eight percent of the consumption of beer in the United States.

Beer is a separate and unique product, a line of commerce, all brands and types compete with each other in price, image, point of sale advertising, media advertising, shelf space, floor display, refrigerator position and in attention from wholesalers and retailers. Beer is a unique and separate product regardless of price.

That brewer (Schlitz)—to improve its position—was required (in 1961) to introduce its own "popular priced brand" or acquire a going brand and, having acquired such "popular priced brand", sought to require its wholesale distributors to carry all of its brands.

Beer is marketed through specialized vendors who are referred to as wholesalers and distributors.

The changes in that defendant's distributor organization, after such acquisition, resulted in a substantial lessening of competition and evinced a tendency to create a monopoly in the production and sale of beer in California, particularly in that such changes caused substantial detriment to other brewers whose beers were formerly sold by such wholesalers and their distributor organizations were disrupted.

Compare the report of testimony in Distribution Problems Affecting Small Business, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate (89th Congress, Second Session, pursuant to Senate

Resolution 191, Part 2, January 18-27, 1966, pages 510-537), partially quoted as follows:

"The future promises a continued and accelerated trend toward concentration in the brewing industry, with fewer brewers and fewer wholesalers . . ."

* * *

"By 1970, . . . The number of wholesalers will decline during the same period to a level between 3,500 and 4,000.

"Unless significant counterdevelopments occur, it is likely that within the next ten years, the same degree of concentration will exist in the brewing industry as in the auto industry, with three or four giant manufacturers controlling the industry . . ." (pages 511-512).

* * *

"The more powerful a brewer becomes, the greater is his ability to insist that a wholesaler carry only his brands and even to require him to drop a competitive brand or refrain from carrying other products such as wines, liquor, or soft drinks.

"This practice, which according to our surveys is widespread, tends to have the following adverse effects: . . .

"(b) Brewers, even major ones, are unable to obtain distribution for their brands; thus their growth is prevented or retarded . . . ."

"This type of restraint is not contained in a written contract between brewers and wholesalers. . . . it is common for the supplier to 'suggest' that a wholesaler either drop a competitive brand or refrain from taking on another

brand. If the suggestion is not accepted, termination of the distributor may follow, at least, that implication is often conveyed to some brewery representatives."

* * *

". . . Ironically, some of the brewers enforcing a policy of exclusive distribution are finding their positions deteriorating steadily because their distributors cannot survive by marketing only their brands.

"In summary, under present conditions, it is possible for a few brewers who can support a network of exclusive wholesalers, to choke their competitiors to economic death simply by controlling the brands handled by their wholesalers and through other means associated with this technique." (page 515).

* * *

The admissions of respondents and the evidence received, and offered and rejected, are further detailed in relation to points of argument in support of this petition.

IV. THE DISTRICT COURT AND THE COURT OF APPEALS WERE WITHOUT JURISDICTION OF THE STATE GENERATED CLAIMS, EXCEPT TO REMAND AND DIRECT A REMAND, RESPECTIVELY, UPON PETITIONER'S MOTION FOR SUCH RELIEF.

Petitioner complained in his first cause of action: ". . . As a direct and proximate result of *defendants'* wrongful conduct as aforesaid, plaintiff has been injured and damaged . . . that *defendants'* wrongful conduct as aforesaid in restraint of trade and competition in the circumstances herein

alleged has *invoked* appropriate provisions of *the statutes of the State of California* entitling plaintiff to recovery . . . ." (CT 22:32; 23:15-20).

The prayer of petitioner's complaint sought relief, in part, as follows:

". . . A. Upon each cause of action for the recovery in damages in the sum of $185,000.00, and such further damages as shall be proved at trial of and *from each of defendants* respectively charged therein; . . .

* * *

E. Upon plaintiff's First and Third Causes of Action, the additional relief, namely: for an order and judgment trebling the damages *herein found and assessed* . . . with section 16750 of the Business and Professions Code; . . ." (CT 31:8-11; 32:7-11).

Defendants were identified as including the five named and appearing natural persons, respondents herein, and the complaint "complains of defendants, and *each* of them . . .".

The sections of the Business and Professions Code referred to particularly included sections 16720 and 16755 (Appendix 11); the latter of which reads, in part:

". . . Any violation of this chapter is a conspiracy against trade, and *any person who engages in any such conspiracy or takes part therein,* or aids or advises in its commission, or who as principal, *manager, director, agent, servant or employee,* or in any other capacity, *knowingly carries out* any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out

such purposes, or orders thereunder or in pursuance thereof, *is punishable* . . . ."

Compare

U. S. v. Wise, 370 U.S. 405, 8 L.ed.2d 590, 82 S.Ct. 1354.

It is, therefore, indisputable that each of the natural persons appearing as parties defendant was properly charged as a participant in the state antitrust claims and conspiracy alleged in the first cause of action (CT 14:23).

The second cause of action (CT 23:27) alleges a conspiratorial interference with petitioner's contract and customer relations, an independent cause of action under state common law, and all participating persons were liable thereunder (*Collins v. Vickter Manor, Inc.,* 47 C.2d 874, 833; *Bancroft-Whitney Co. v. Glen,* 64 C.2d 327, 49 Cal.Rptr. 825, 411 P.2d 921; and *Wise v. Southern Pacific Co.,* 223 C.A.2d 50, 35 Cal. Rptr. 652).

It is admitted that this cause of action stated a claim and specifically charged each of the five appearing natural parties defendant thereunder and it is also admitted that said parties have been—at all times—California citizens, residents and domiciliaries.

The jurisdictional question was called to the attention of the Court of Appeals, including particular reference in the Petition for Rehearing before that court in part:

"Thirdly, the trial court did not obtain jurisdiction of the cause—except the fourth cause of

> action—because defendants Flanigan, Elliott, et al., are natural persons and California residents, as is appellant, and appellant timely moved to remand after removal of the cause from the state court."

Section 2, Article III, of the Constitution of the United States confers jurisdiction over non-federal, private, civil causes and subject matter only "between citizens of different states".

Section 1332 of Title 28, U.S. Code implements the constitutional provision to provide that ". . . the District Court shall have original jurisdiction over all civil actions . . ." between ". . . citizens of different states . . .". It is the uniform rule of decision that the constitutional provision and the acts of Congress must be construed to invoke jurisdiction of the federal courts of such causes only where all the parties on one side of the controversy are citizens of states different from those of residence of all parties on the other side (*Strawbridge v. Curtis,* 7 U.S. 267, 2 L.ed. 435; *City of Indianapolis v. Chase Nat. Bank,* 314 U.S. 63, 62 S.Ct. 15, 86 L.ed. 47; and *Brazier v. Cherry,* 188 F.Supp. 817, 293 F.2d 401, 368 U.S. 921, 82 S.Ct. 243, 7 L.ed.2d 136).

It is manifest that the removal of this cause from the state court was without jurisdiction and petitioner's timely motion for remand was required to be granted by the District Court and to be directed by the Court of Appeals—hence all proceedings subsequent to petitioner's motion for remand were void, excepting only as to the federal antitrust claims

(Appendix 12) asserted in the fourth cause of action, filed after the denial of said motion (Appendix 6 and Pretrial Order CT 423:15-16, and CT 426:27-427:2; and Amendment to Complaint CT 572:21-27).

V. THE PURPORTED MOTION FOR A DIRECTED VERDICT DID NOT INVOKE THE JURISDICTION OF THE TRIAL COURT.

Rule 38(a), Rules of Civil Procedure, provides that—

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate"

and Rule 50 further provides that—

> *"A motion for a directed verdict shall state the specific grounds therefor."*

The latter requirement modified the rule of decision in some of the circuits and the rule is to be enforced as written.

See the recent case of

Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449, 452 (November 21, 1966, Ninth Circuit, affirmed in this respect 386 U.S. 37), stating the rule, namely:

> ". . . In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. 'On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom

> the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify. . . . This is true even though contrary inferences might reasonably be drawn.' . . .".

It is respectfully submitted that it can only be fairly said that the trial court and Court of Appeals did not apply these accepted principles to the resolution of this motion for a directed verdict—either in spirit or in detail—rather appeared to feel some unarticulated compulsion to grant the motion, in spite of acceptable evidence upon every element of fact material to the support of a verdict upon each of petitioner's causes of action to have been noted in the reported precedents.

It is only fair to say, further, that references to the record and the argument on the motion were examined by the trial court as though addressed to the burden of persuasion—rather than to the question whether the record would support a finding of a jury upon the particular subject matter of the relevant reserved issues and the rulings actually assumed that the judge presiding was the finder-of-fact (see RT 1114:3-1117:11; 1119:23-1125:23, 1137:4-1140:12; 1143:1-1145:7; 1146:3-1148:24; 1152:10-1160:9; 1163:13-1174:7; 1176:1-25; 1187:7-12; 1200:21-1203:25; 1213:4-17; 1216:16-1217:22; 1225:17-1226:25; 1241:1-15).

An example (RT 1176:19-25) may be briefly quoted to illustrate, namely:

> "The Court: . . . *If I were sitting there as a juror I wouldn't agree with you,* and I think

> I pretty much indicated this in so far as this first count is concerned and *I don't agree with you*, . . ."

Moreover, the trial court consistently took the position that the burden was on the petitioner, as the plaintiff, to "demonstrate" the various factual elements of his case, as adequately illustrated in the argument (RT 1164:10-1167:25), in relevant part:

> "The Court: . . .
>
> Now the next question I ask you is: *Where do we have any demonstration* that this was done for the unlawful purpose of restraining trade in beer, . . . in other words, to give Mr. Scanlan a franchise for San Joaquin County only?
>
> * * *
>
> The Court: Let's go on from there. I am going to take these one at a time. *Wherein do you demonstrate* at any place that the exclusivity of the contract or franchise allocated to Mr. Scanlon or Mr. Giahos in Stanislaus County was granted for the purpose of unlawfully restraining trade?
>
> Mr. Hutchinson: . . . In other words, the evidence would indicate that they dominated these independent distributors in every way that was feasible to the kind of merchandise we are dealing with, geography and human nature. I mean, they just told each of these people what to do, including demanding what was most hurtful dealings in regard to Busch Bavarian."

The formal order and judgment are as non-specific as was the motion (CT 576-579). The oral rulings (RT 1243-1248) seem more to evince concern over

instructions[2] to the jury, and considerations of resolution of the evidence and matters of credibility (e.g., RT 1044:11-1045:15).

In particular, the express admissions of respondents in pleading and discovery and their express concessions during trial—which virtually removed the principal issues from the case—were disregarded.

Further, full consideration was given purportedly defensive matter, admittedly not "in our case" (RT 1144:13-1145:7) and received over objection, for example: the unpleaded, phantom issue sought to be erected upon a letter received and acknowledged by petitioner *after* the making and substantial performance of the distributorship contract, notwithstanding that it was expressly conceded that such letter was not even asserted as a contract, integrated or other (e.g., RT 1213:4-21 and 1223:12-1224:7).

In consequence of respondents' *failure to specify any defect in proof of any reserved issue of fact* and the generality of the trial court rulings, no opportunity to accomplish augmentation, if any were required, in support of any reserved issue was afforded petitioner as the plaintiff in the action. Thus the rulings on the purported motion for a directed verdict constituted clear error.

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[2]For example: it was conceded that, if made, a motion for a directed verdict in favor of petitioner on the third (tortious interference) cause of action would have been granted upon the admitted and conceded facts (RT 1123:22-1125:23).

VI. THE JUDGMENT PROPOSED BY THE COURT OF APPEALS IS CLEARLY ERRONEOUS IN DISREGARDING THE ADEQUATE FACTUAL SUPPORT FOR A PLAINTIFF'S VERDICT UPON EACH OF PETITIONER'S CAUSES OF ACTION.

Assuming jurisdiction of the cause in respect to the state generated claims, the proposed judgment of the Court of Appeals is clearly erroneous in purporting to resolve the evidence, including inferences properly drawn from the testimony and documentary proof, to thereby deprive petitioner of his right to a trial by jury and of due process of law and equal protection of the law, in respect to each of the state generated claims set forth in the original complaint (CT 14:33). The proposed judgment is equally erroneous in respect to the restatement of the facts in petitioner's first cause of action as violative of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, et seq.) set forth in the amendment and supplement to the complaint after removal.

Further assuming that it might be deemed that there were a lawful and adequate motion to have invoked jurisdiction to direct a verdict was advanced, the judgment proposed by the Court of Appeals constitutes and is based upon clear error. The opinion (Appendix 3) makes explicit the assumption that the Court of Appeals, upon this "motion", was empowered to resolve the evidence as the finder-of-fact in usurpation of the function of the jury; and, secondly, the Court of Appeals, itself, seeks to appropriate the fact finding function of the jury—precisely, in rejecting petitioner's evidence, purporting to consider matters of credibility and adopting evidentiary assumptions

upon purportedly "defensive" matter erroneously intruded in the plaintiff's case in chief (Appendix 3).

These errors are further exposed, in relation to petitioner's respective causes of action, in the discussion following.

A. The Record Fully Sustains a Petitioner's Verdict Upon Petitioner's First and Fourth Causes of Action, Asserting Antitrust Claims Under State and Federal Statutes, and It Was Clear Error to Take These Claims From the Jury.

As indicated, petitioner alleged the basic facts of his antitrust claims under California statute (Appendix 11) and restated them, by reference, under the Sherman and Clayton Acts (15 U.S.C. 1, et seq.) upon removal of the cause (CT 14:27-15:14).

In respect to the state claim, the complaint further set forth verbatim the provisions of section 16727 of the code (Appendix 11).

By answer, respondents admitted the formal allegations of nature and scope of business activities of the parties and admitted that *a wholesale purchaser purchasing the brewery's beers "acquires title thereto"*, the course of dealing alleged, petitioner's course of dealing in Hamm's beer and that *Hamm's and Bavarian beers are accepted as competitive* of each other "to a degree greater than either is competitive with Budweiser and Michelob beers". It was further admitted that intense competition exists between brewers, wholesalers, and retailers of all beers, and that the supply of beers in petitioner's territory exceeds the total public demand, that the introduction of Bavarian beer would increase and intensify competition

between brewers, wholesalers, and retailers of all beers, and that it is contrary to law and public policy for the latter to seek to increase the consumption of beer.

It is undisputed that petitioner and respondents were engaged in both interstate and intrastate business (CT 15:15-18:21) and the transactions disclosed by the pleadings and the evidence are within the legislative jurisdictions of the United States and of the State of California, respectively. It is the holding of the California reviewing courts that California statute and common law may be equated to the Sherman Act, 15 U.S.C. 1, et seq. (*Speegle v. Board of Fire Underwriters, supra,* 29 C.2d 34, 44), and that rulings of the federal courts on matters relating to the Sherman Act are of equal value as interpretive precedents for application of the state statutes (*People v. Santa Clara, etc., Assoc.,* 238 C.A.2d 225, 232, 47 Cal.Rptr. 570).

The pretrial order reserved the issues of petitioner's first and fourth causes of action, as follows:

> "*Issues of Law Presented.*
>
> "(1) Was the termination of dealings between defendant Anheuser-Busch and plaintiff and the refusal of Anheuser-Busch to sell Michelob and Budweiser beers to plaintiff subsequent to May 1, 1963, an unlawful restraint of trade under the State or Federal antitrust laws?"

Petitioner's testimony at the trial included the deposition reference given in the order on summary

judgment (Appendix 12) and reads, in relevant part, as follows:

> "'. . . I told him [Flanagan] that I just absolutely couldn't give up Hamm's; that I would be bankrupt. That I had worked long and hard and done a good job and had the big investment there. I didn't feel it was even fair for him." (RT 345:7-17).
>
> * * *
>
> "John admitted he realized that fact but he also stated *Busch could or would not be under the same roof with Hamm's.* I would either have to go along with them *without Hamm's or attempt to set it up separate.* He insisted that only Bud and Busch would go on the trucks." (RT 346:4-9).

Appellant's evidence below sought, and indubitably sufficed, to invoke the rules of decision of the Court of Appeals in the comparable decision of the Court of Appeals in *Girardi v. Gates Rubber, etc., Inc.*, 325 F.2d 196, 199, 200, to wit:

> ". . . We are unable to perceive any reason why the simplicity and limited scope of the actions alleged to have been taken here would prevent the application of the rule of United States v. Socony-Vacuum Oil Co., quoted supra [310 U.S. 150, 224] . . .
>
> "The situation here is similar to that referred to by the Court in Klor's v. Broadway-Hale Stores, 359 U.S. 207, 213, where, . . . the Court said, 'As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy . . .";

and in the case of *Walker Distributing Company v. Lucky Lager Brewing Co.*, 323 F.2d 1, 7 (Ninth Circuit), referred to in the trial court's ruling upon summary judgment (Appendix 12) which further held, namely:

> "Essentially, what is charged is a conspiracy between Lucky and some of its other distributors, the purpose of which is that none of them shall carry Coors or any other competitive beers. This conspiracy is directed primarily at the makers of those beers, of whom Walker is not one. But if a conspiracy to establish such a boycott of those beers is illegal, as we think it may be, and *if one of its intended and actual effects is to cut off a supply of Lucky's beer to a distributor who does not join the conspiracy, we can see no reason why that distributor does not have a valid claim for relief.*"

The state court rulings are to the same effect: in *Speegle v. Board of Fire Underwriters*, 29 C.2d 34 the state high court held that refusal of the board companies to deal with the plaintiff unless he adhered to their demand that he not sell non-board insurance was actionable as a violation of the antitrust laws of the state.

In the leading case of

> *Kold Kist v. Amalgamated Meat Cutters*, 99 C.A.2d 191, 201, 221 P.2d 724 (Hearing, Supreme Court, denied),

the California rule of decision is further delineated, in revelant part:

> ". . . The courts of this state have held that the letter and paramount object of the law (Cartwright Act) is satisfied if the tendency of the action or proposed action is to restrain trade. . . ."

Prior to the meeting of respondent brewers' representatives, Flanigan and Elliott, with petitioner and with other California distributors of Anheuser-Busch products—Flanigan, in behalf of respondent Anheuser-Busch, and one Newhouse, in behalf of a competing brewer, Theo. Hamm Brewing Company—entered into a compact with respect to the division of territories and substitution of distributors as between said brewers in certain areas of California, particularly including the City and County of San Francisco (Appendix 8). The admissions of respondent Flanigan raise the inference that the compact between these brewers also provided for the switching of brands in petitioner's operations, but petitioner was not apprised of this scheme during the period leading to respondent brewer's refusal to further deal with him.

Compare:

Burke v. Ford, 386 U.S. ....., 19 L.ed. 554 (December 11, 1967, No. 632).

Preliminary to the series of meetings with individual distributors of the brewery's Budweiser and Michelob beers held in San Francisco, California, during the first half of February, 1963, petitioner was advised, during late 1962 and early 1963, by the brewery and its advertising agency that its existing advertising program would be curtailed (RT 186:24-192:18; plaintiff's exhibits G and H). During December 1962,

the brewery wrote "all California wholesalers" (RT 193:19-196:11; plaintiff's exhibit I) and demanded a "build-up" of distributors' inventories "prior to March 1, 1963". The "next change in regular dealings" with petitioner was the urgent demand of the brewery's O'Shanesy, in "early January of 1963" for petitioner's "K.P.A. list" (plaintiff's exhibit J) "similar to your Hamm's evaluation or classification of these accounts", which "key potential account list" as based on petitioner's sales of Hamm's beer was furnished the brewery (RT 196:13-202:13).

The next event was O'Shanesy's request to petitioner that he attend a meeting in San Francisco and to bring with him his "1962 Hamm's sales figures along with my 1962 Budweiser figures", stating the meeting "is in regards to Busch-Bavarian" (RT 205:3-206:23).

On or about February 8, 1963, petitioner attended the pre-arranged conference with the brewery's Flanigan and Elliott at a San Francisco hotel (RT 206:24-207:23).

The purpose of the meeting was announced and included statements of the participants as indicated (RT 209:1-216:20) as follows:

> "... [Flanigan]: ... 'we are coming with Busch Bavarian ... you can see our position that all these California breweries, with the exception of Hamm's, are down in sales, and this looks like our opportune time to move into the California beer market. *Some of these breweries are getting pretty weak and some of them won't survive ... Now, we're coming with this program and we ex-*

pect all of our wholesalers to give up something . . . We realize because we are a premium priced beer up till now that *we are in with every brand of beer* listed *on this chart or in the State of California, and coming with this we are going to upset the whole beer business* because we are in with some brand in almost every wholesalership in the State of California.'

* * *

"I [petitioner] told them it was an impossible situation for me to even consider dropping a brand of beer like Hamm's, that I was selling in excess of 200,000 cases for an unknown 88,000 anticipated sales plus 45,000 known sales, and I am taking a big pay cut and going bankrupt on this basis.

* * *

"They told me that they wanted a separate operation then with only Anheuser-Busch products on the trucks and nothing under that roof but their products.

* * *

"Then Mr. Elliott told me, he says, 'No, Bill, *if we go into this kind of arrangement we want you to take your name or the Scanlan Distributing Company name and put it over our door where our products are,* and if we build a new building or if you build a new building and our products are in there *we want the name Scanlan Distributing Company. You can find a different name or run the other one or let Fred run the Hamm's end of the operation.'"*

* * *

The admitted and conceded facts of repudiation of petitioner's contract with the brewery, when designed

to enable the brewery and associated parties to unfairly compete, is independently actionable as unfair competition *(Buxbom v. Smith,* 23 C.2d 525, 545, 547-548). The conspiratorial interference and acts detailed in respect to the unfair competition claims (subpart B of this part VI, *infra)* are acts of unfair competition *eo nomine.* It is the consistent holding of the reviewing courts that such conduct, in and of itself, constitutes actionable violation of the antitrust laws *(Perryton Wholesale, Inc. v. Pioneer Distributing Co., etc.,* 353 F.2d 618, 621-622, and *Atlantic Heel Co., Inc. v. Allied Heel Co., Inc.,* 284 F.2d 879, 884, and cases cited).

In addition, respondents' answer to petitioner's first and fourth causes of action includes the following admissions of ultimate fact:

> ". . . that Anheuser-Busch endeavored to find a suitable wholesale distributor in the Stockton area to distribute Busch Bavarian beer alone at wholesale, *that the* only suitable wholesale *distributor* Anheuser-Busch was able to find in the Stockton area for Busch Bavarian beer *refused to distribute said beer at wholesale unless Anheuser-Busch also sold said distributor its Budweiser and Michelob beers for wholesale distribution as well, and that Anheuser-Busch . . . did, cease selling its beer products to plaintiff, . . .".*
>
> (Defendants' answer, 4:11-23)

There is no problem of tracing petitioner's injuries to the overt acts of respondents and their co-conspirators *(Speegle, supra,* 29 C.2d 34, 40-42, 51)—inasmuch as he was deprived of an established business in Bud-

weiser and Michelob beers in his exclusive territory, otherwise to have continued into the future. While the detail of damages was expressly reserved by approved stipulation, petitioner testified that he was injured by termination of annual sales in the amount of $289,000 gross proceeds of sales, from which he had received a profit ". . . in round figures . . . over cost of purchases and freight and everything else . . . in excess of $50,000" (during the last normal full year, 1962, RT 281:12-17).

Upon receiving unsympathetic consideration of his "simple case," as projected by the ruling on respondents' motion for summary judgment, the admitted facts, pleadings and pretrial conference order, petitioner "fleshed out" his showing "to cover all the bases" and proceeded to the supererogatory task of establishing a full state, or government, case (*United States v. Schlitz,* supra, 253 F.Supp. 129), affirmed 386 U.S. 37, 17 L.ed.2d 35) and introduced admissions of defendants establishing a scramble of distributor relationships in the state of greater scope than that found in the government case in the same area of litigation and during the same period of time in *Schlitz* (RT 1009:11-1031:23). Twelve of the brewery's distributors were required to "drop" another brand—Falstaff, Regal, Lucky Lager, Burgie, Hamm's, and Fisher—and nineteen "new distributors" were established (in *Schlitz,* the court found that the acquisition of Burgermeister resulted in only thirty-one distributor changes in the state (253 F.Supp. 129, 141)).

In respect to a major market, San Francisco, respondent Flanigan testified that two Hamm-Budweiser

distributors in that city were "switched" so that a former distributor of both brands became an exclusive Hamm's distributor and the other became an exclusive distributor for the brewery (Budweiser, Michelob and Busch-Bavarian) throughout the city (RT 1025:8-1026:21).

In addition to dislocation of Hamm's distributors, petitioner further established the interference with other brewers' distribution systems. For example, in the immediately adjoining county and merchandising area, Pete Giahos testified that his firm was required by this brewery to give up the distribution of Falstaff beer and to take in substitution the Bavarian product. He had attended the February meeting in San Francisco and had subsequent discussions with the brewery representative, George Newhouse, as related by this witness, in part, as follows:

> "Our basic discussion at this point was that Mr. Newhouse led me to believe that *he couldn't formally tell me that I would be able to handle Busch Bavarian beer unless a competitive line of beer in my house was dropped.*"
>
> * * *
>
> "Q. And which brand was it?
> A. *Falstaff.*"
> (RT 444:9-447:15)
>
> * * *
>
> "I remember quite well, because Mr. Elliott and I had discussed the fact that I hadn't made a decision of what I was going to do and he said to me, 'Peter, it is getting close to April 15th. You better make up your mind what you are going to do.'

"And I told him, 'You are making it very difficult for me, and I can't quite make up my mind and *I would like to keep my house in order.*'

Q. Did he respond to that statement?

A. Yes, he did. *He told me that inasmuch as time was nearing to the kick-off date of April 15th that if I didn't make up my mind he would have to look elsewhere.*"

* * *

"Q. About what date, if there was any date, was the purchase of Falstaff to cease, immediately or at some future time?

A. We terminated effective the last day of March. As I recall it was on a Friday."

(RT 515-523.)

Although approximately one year later the Giahos firm was "permitted to resume" distribution of Falstaff, the volume sold in its territory had fallen off fifty percent and more.

It is without any dispute whatever that the brewery required of all of its distributors, in the state and elsewhere, to sign the letter-postscript purporting to create "an arrangement not amounting to a contract" which would reserve to the brewery the claimed right, first, to terminate the course of dealing at any time without cause and without notice, and, secondly, would, upon such termination, require the distributor to transfer his inventory to the brewery "or its newly designated wholesalers . . . at the original cost of acquisition."

Since the brewery not only required the ceremony of signature to the letter-postscript by all purchasers

of its products at wholesale for resale, but vigorously enforced its claimed privileges thereunder, it is clear that this scheme is the equivalent of the "short term lease-consignment arrangement" held actionable as a restrictive device in the case of *Simpson v. Union Oil, etc.* (377 U.S. 13, 12 L.ed. 2d 98, 84 S.Ct. 1051) as an arrangement by which "dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive" (377 U.S. 21).

Herein the evidence satisfactorily establishes, *inter alia,* that the brewery fixed its prices of sale to the distributors, the distributor's prices of sale to the retailer, and the retailer's prices of sale to the consumer.

Although the code (sections 16900, et seq.) authorizes resale price maintenance agreements (which might otherwise be immune under the Maguire Act (66 Stat. 632, 15 USC 45)), the record is devoid of reference to any resale price maintenance agreement of any kind.

Moreover, the brewery has always operated "branches" (RT 1028:15-1029:9) in direct competition with its purchasers at wholesale at the same level of merchandising *(United States v. McKesson & Robbins,* 351 U.S. 303, 312, 100 L.ed. 1209, 76 S.Ct. 937).

Petitioner fully proved all that could be required of a private litigant to sustain a case under the state and federal statutes conferring upon private litigants the right to recover for injuries sustained by activity

in violation of such statutes—and, further, has established what would suffice for a state, or government case. *(Schlitz,* 253 F. Supp. 129, 141-143 and 149.)

Rather, the record permits only the conclusion that the brewery planned its campaign and utilized and attempted to use its existing distributorships as expendable shock troops in the guerilla warfare waged to destroy its competitors, i.e.: "some of them will not survive"—not to lawfully merchandise its Bavarian product.

All the demands of this brewery were bottomed upon the existing matrix of restrictive devices and practices,[3] e.g.: price fixing, territorial limitations, limitation upon customer selection, proscription of retail "split-accounts", etc., already imposed and specifically enforced by the implicit and explicit threats to cut off supplies, "to look elsewhere" asserted "as its right" under the post-negotiation, no-term, non-contract "policy" to the patent destruction of the business of the individual distributor.

It is manifest the Court would not tolerate—much less approve and enforce—this scheme, as the judgment of the Court of Appeals certainly would do.

The ruling and judgment taking appellant's anti-trust claims from the jury are without support and

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[3]The tie-in of the Bavarian beer to the established Budweiser and Michelob beers was independently wrongful—even without the exclusion of competing brands (see *Black v. Magnolia,* 365 U.S. 24, 2 L.ed.2d 5, 106 S.Ct. 106). The testimony of petitioner, Giahos, Orsolini (Appendices 7, 9 and 10), leaves no doubt of the tie-in of "all three" brands as a condition to the purchase of any of them.

the judgment should be reversed with appropriate directions. Since all that is required to sustain a plaintiff's verdict is contained in the admissions of respondents and established by evidence received directly from respondents, it appears that such directions should include a requirement that the trial court direct a verdict on the issues of liability upon petitioner's antitrust claims and to proceed to trial of the issues of petitioner's damages *(Simpson v. Union Oil Co., etc.,* supra, 377 U.S. 13, 24).

Compare:

U.S. v. Arnold Schwinn & Co., ... U.S. ....., 18 L.ed. 2d 1249.

B. The Record Demonstrates a Complete Factual Showing of Conspiratorial Undertaking and Damaging Acts of Unfair Competition by Respondents, as Claimed in the Third Cause of Action, as Actionable Under State Law.

The express admissions and concessions and the evidence present a classic, a classroom, example of actionable unfair competition under California common law: Barosso was a managerial and specially trusted employee of petitioner, a specialist in draft beer sales and promotion—the then currently "heated" element of the warfare among brewers in petitioner's exclusive territory, because the limitation of space for tapping facilities limited such sales to retailers to 1-3 brands of beer on tap and resulted in the exclusion of competitors' beers from, and thus tended to monopoly in the purchases of beer by, retailers (Pretrial Order, CT 424-426, admitted facts, paragraphs 4, 5, 9, 10, and 12).

Secondly, Barosso, with his brother Steve, had sold their beer distribution business (Budweiser and Michelob) of many years duration to petitioner in 1961 and the Barossos and their employees accepted employment of petitioner, all as a part of the three-way deal of that partnership, the brewery and petitioner, occasioned by Barossos' lack of capital and success, the brewery's desire to keep its two brands of beer "on the street" and to provide "a peaceful transition of the line" upon petitioner's undertaking to accept the exclusive distributorship, expand his warehouse, purchase additional trucks and tap beer equipment, employ additional men and do the many things required to create and maintain a "competitive" distributorship for the brewery's two then available beers.

All went well until the brewery decided to introduce its third brand beer into the state and petitioner's exclusive distribution territory and demanded that each of its distributors "give up something" to assist the brewery in its competition with all other brewers selling beer therein. The brewery's demand, as related to petitioner, meant that petitioner must "give up" his distribution of Hamm's beer. When petitioner refused to comply with this requirement of the brewery and also declined the alternative requirement that he disassociate his personal name and connection with his existing Hamm's distributorship and duplicate his warehouses, equipment, etc., etc., for the brewery's beers—the brewery went searching for a "new distributor" in petitioner's place.

Barosso, while still an employee of petitioner (RT 565:21-570:15; 590:20-602:8) and the brewery's Newhouse met, talked with the brewery's Elliott and they then met or talked by telephone with the Dinubilos, licensed to engage but inactive in beer distribution, and an agreement was reached that Barosso and the Dinubilos would become the brewery's "new distributor" and would have exclusive distribution of all three of the brewery's beers within petitioner's territory—to the exclusion of petitioner and to the destruction of his business in the distribution of Budweiser and Michelob by the tie-in of the latter beers to sales of Bavarian beer. As a part and condition of this scheme, the brewery agreed to terminate and did terminate its supplies of beer to petitioner.

Barosso and the brewery's salesmen forthwith proceeded to aggressively and systematically solicit petitioner's established customers, particularly draft beer purchasers, to "switch" such customers to the "new distributor"—in competition with petitioner, to the exclusion of petitioner—and to the brewery's beers, to the exclusion of Hamm's beers, and Barosso has so continued in behalf of the brewery ever since (RT 556:4-561:8; 565:21-575:17; 590:20-620:16).

On the latter subject matter, Barosso was explicit (RT 604:19-622:16; 635:11-18), in part:

* * *

"Q. Did you understand when you sold your business to Mr. Scanlan that he was to have whatever good will or whatever you had in relationship with these accounts?

A. That is right, and they stayed with Budweiser beer."

(RT 609:2-6)

* * *

"Q. Very well. Now, *you did systematically solicit the business for your new people Anheuser-Busch products utilizing whatever contacts you had, whatever personal acquaintance you had, knowledge of Mr. Scanlan's business in doing so; is that right?*

A. *Yes. Competition.*

Q. You called on everybody that you had called on before; is that right?

A. *On all of them, every account, not only the Hamm's account, all of them.*

Q. That is all of the accounts that could buy beer, draft beer?

A. Yes, beer.

Q. Now, you continued—withdraw that. *You had served primarily as a draft beer salesman and I guess Manager of that department for Mr. Scanlan; is that right?*

A. *Yes.*

Q. *Did you continue in a similar capacity when the new venture was set up?*

A. *Yes,* more or less."

(RT 618:21-619:15)

* * *

Barosso, in behalf of himself and the new distributor, also solicited other of appellant's employees to switch to them (RT 623:17-625:18; 633:12-23).

Barosso further testified that the exclusion of petitioner from further purchase of the brewery's beers

was because he and Dinubilo demanded "all three" and the brewery agreed (RT 628:23-629:14) namely:

> "Q. Did you ever make inquiry before you made these other arrangements that resulted in talks with Mr. Dinubilo and with Mr. Newhouse on the 8th, as I recall; didn't you make inquiry about what was going to happen to Mr. Scanlan?
>
> A. *Yes, yes, I said, 'We got to have the three labels.'*"
>
> (RT 628:23-629:14)

Barosso's solicitation was successful (RT 636:20-637:3).

There can be no reasonable doubt that respondents' express admissions and Barosso's own testimony establish a claim for damages suffered upon respondents' conspiratorial raid upon petitioner's employees and customers.

Such switching of an entrusted employee to the new employer is unfair competition by the new employer and those participating *(Bancroft-Whitney Co. v. Glen,* 64 C.2d 327-332, 49 Cal.Rptr. 825, 411 P.2d 921) particularly when accompanied by a breach of contract *(Buxbom v. Smith,* 23 C.2d 535, 547-548, 145 P.2d 305) and the breaching and inducing parties are all liable *(Wise v. Southern Pacific Co.,* 223 C.A.2d 50, 35 Cal. Rptr. 652).

The California law is clear that—on Barosso's own testimony—Barosso as the seller of his business was not free to attempt to recapture his customers to petitioner's disadvantage. See *Handyspot Co. v. Buegeleisen,* 128 C.A.2d 191, 195, 274 P.2d 938, holding as follows:

> *"A sale of the property and the business* to which a good will adheres *transfers the good will to the vendee, although not specifically mentioned in the contract of sale."*
>
> * * *
>
> *"The seller of good will,* even in the absence of restricted covenant not to compete, *will not be permitted to destroy the value of the good will by canvassing directly with his old customers* endeavoring to dissuade them from dealing with the purchaser of the good will, and *soliciting them to trade with the seller."*

The privilege of lawful competition does not justify such conduct *(Imperial Ice Co. v. Rossier,* 18 C.2d 33, 36, 112 P.2d 631, and *Buxbom v. Smith, supra,* 23 C.2d 535) and the contracting party and all who participate with him are equally liable *(Wise v. Southern Pacific Co., supra,* 223 C.A.2d 50, 35 Cal.Rptr. 652, hearing denied). Further, the good will—even as related to trademarked articles of other persons—is clearly saleable *(Carey v. Kraft-Phenix Cheese Corp., supra,* 24 C.A.2d 517).

Specifically, petitioner's purchase of the Barossos' business carried with it an undertaking to refrain from competing with petitioner.

See, *Falstaff Beer, Inc. v. C. I. R.,* 322 F.2d 744, 747-748 (1963), in part:

> "The sale of good will carries an implicit agreement to refrain from competing or interfering with the market [citations].
>
> * * *
>
> ". . . As the Louisiana court held in Mouton v. Hebert, *it is unfair and tantamount to fraud, to*

sell a business with one hand and attempt to recapture its fruit with the other."

* * *

"Coupled with Heusinger's sale of his beer inventory and the delivery of his organization to Monfrey, *Heusinger disqualified himself from competing with a different beer,* but the same drivers (salesmen) and customers. . . ."

See, also,

Macken v. Martinez, 214 C.A.2d 784, 788-789, 29 Cal.Rptr. 867.

As petitioner's employee, Barosso was, of course, bound to the utmost good faith toward plaintiff and certainly violated these obligations by dealing with the brewery, Newhouse and the Dinubilos.

See the cases of:

Walter J. Haggerty Jr. v. Burkey Mills, Inc., 211 F.Supp. 835, 837;

Community Counselling Service Inc. v. Robert Benedict Reilly, 317 F.2d 239;

Inland Rubber Corp. v. Triple A. Tire Service, Inc., et al., 210 F.Supp. 880;

and authorities cited.

The California cases declare an employee or former employee may not appropriate his employer's business in this fashion. A recent case, *American Loan Corp. v. California Commercial Corp.,* 211 C.A.2d 515, 521, 522-525, 27 Cal.Rptr. 243, states the general rule as follows:

"'. . . A list of subscribers of a service, built up by ingenuity, time, labor and expense of the

owner over a period of many years is property of the employer, a part of the good will of his business and, in some instances, his entire business. *Knowledge of such a list, acquired by an employee by reason of his employment, may not be used by the employee as his own property or to his employer's prejudice.'"*

In the most recent case of

Whitted v. Williams, 226 C.A.2d 52, 56, 57, 37 Cal.Rptr. 692,

the Court further details the controlling rules of decision, in relevant part:

"A customer list may exist in the memory of the employee as well as in writing. *(George v. Burdusis, supra,* 21 Cal.2d 153, 160.) . . .

* * *

"The special finding that the names, businesses, and addresses of those *customers were not secret is of no consequence in view of the confidential nature of other information acquired by this defendant in the course of his employment as a delivery route employee. . . . The use of that status to the detriment of his former employer was unfair.* . . . The evidence also shows that *the information he acquired with respect to the buying habits of those customers, their needs, and the methods of fulfilling those needs, which was basic to the operation of a profitable business, was a trade secret within the principles of law heretofore noted."*

See the closely parallel case of

Buxbom v. Smith, supra, 23 C.2d 535, 547-548,

declaring the applicable rules of decision as follows:

". . . Here the record shows that the *defendants gained an unfair advantage over the plaintiff through deceptive dealings in the form of a contractual agreement* whereby they deliberately induced the plaintiff to build up his distributing organization to a level consistent with the advertising needs of their then noncompeting business and then, having acquired through their employment *agreement with the plaintiff, complete knowledge of his business methods and records, they undertook to terminate their relationship with him, hired his crews, and assumed control of his valuable enterprise. . . .*"

* * *

". . . A breach of contract is a wrong and in itself actionable. *It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above.* It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees. (See Prosser, Torts, p. 1023, et seq.; Rest. Torts, sec. 768)."

It is respectfully submitted that the ruling directing verdict and judgment of dismissal as proposed to be affirmed by the judgment of the Court of Appeal, as related to petitioner's unfair competition claim, is clear error and that the judgment should be reversed with directions to the District Court (1) to direct a verdict upon the admitted and undisputed facts as against all appearing defendants on plaintiff's second cause of action, upon all issues of liability, and (2) to

proceed to the trial of the issues of damages and accounting under this cause of action.

C. The Proposed Judgment Results from, and Constitutes Clear Error As Related to the Contract Claim (Second Cause of Action, CT 10:23-14:11).

The admissions and evidence support a verdict in favor of petitioner upon the contract alleged in his second cause of action in accordance with the law of the state.

The brewery's answer to the contract cause of action posed no affirmative defensive matter and placed in issue material allegations by general denials, only, except for the certain factual matters which were expressly admitted, the principal of which is as follows:

> ". . . plaintiff purchased certain assets of the wholesale distributor previously engaged in distribution of Anheuser-Busch beers in the Stockton area, employed Fred Barosso and Steven Barosso, enlarged plaintiff's warehouse building, constructed a walk-in box on plaintiff's business premises and made other improvements therein . . ."

The pretrial order (CT 427:3-7) reserved the issues of law related to the second, contract, cause of action as follows:

> "(2) Was there an oral contract between plaintiff and defendant Anheuser-Busch by the terms of which Anheuser-Busch was obliged to continue selling its Budweiser and Michelob beers to

plaintiff and, if such contract is found, was it breached by said defendant?"

The termination of performance of the contract by the brewery, as stated to the jury in respondents' opening statement (RT 89:16-90:1) occurred as follows, namely:

> "*Mr. Elliott, acting on the authority conferred* on him by his superiors, called Mr. Scanlan and *said, 'We found a new distributor, Dinubilo & Sons. They will take the products provided they can have all of them.' And I think he said, 'We find it regrettable to have to terminate you in these circumstances, Bill.'* Mr. Scanlan said, 'What's the termination date going to be?' Mr. Elliott said, 'You name it.' Mr. Scanlan said, 'You name it.' Mr. Elliott said, 'May 1st.' *And ultimately it came to pass that on May 1st the Dinubilos started out as the new Anheuser-Busch products distributor* including Busch Bavarian in Stockton."

The agreed facts stated in the pretrial order (CT 424:24-425:12 and 426:6-9) as relevant to the contract claim include the following:

> "(4) From 1948 until 1961 Budweiser beer and Michelob beer . . . were distributed in San Joaquin County by . . . Barosso Beverage Company.
>
> "(5) . . . *After further discussions between plaintiff, Barosso and representatives of Anheuser-Busch, plaintiff bought certain assets of Barosso Beverage Company and thereafter plaintiff was appointed and commenced to serve as wholesale distributor of Budweiser and Michelob* on October 1, 1961.

"(6) *From October 1, 1961 to May 1, 1963, plaintiff served as wholesale distributor for* Hamms Beer and for defendant's Budweiser and Michelob beers. . . .

* * *

"(9) On or about April 9, 1963, defendant *Anheuser-Busch informed plaintiff that it would no longer sell Budweiser beer and Michelob beer to him for resale* in San Joaquin County after May 1, 1963."

It was expressly conceded at trial that plaintiff was the exclusive distributor with the exclusive right of purchase for resale at wholesale of the two identified brands of the brewery's beer in San Joaquin County (RT 20:2-22; 997:6-8) and that petitioner performed every obligation of the agreement[4] he alleged and that he carried out every requirement of the brewery in respect to his distribution functions in a satisfactory manner is also conceded, throughout the record, and without qualification or reservation (e.g.: RT 81:19-24; 167:4-8; 1108:25-1109:5).

Respondents' representations to the trial court on the latter subject include (RT 20:4-22) the following:

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[4]Incredibly, the brewery contended there was no agreement whatever between it and appellant! See reporter's transcript, at pages 6-37 and 1086-1101, "an effort to demonstrate that a contract did not exist" (RT 328:12-21, *inter alia*), and compare *J. C. Millett Co. v. Park & Tilford, etc., Corporation*, 123 F.Supp. 484, 489, ruling *contra*, in part:

"*The defendant argues* that there was no contract at all. '*There was merely an arrangement not amounting to a contract,* under which plaintiff was given the privilege of distributing Park & Tilford products.' . . ."

"The Court: Under the terms of that relationship *would you have had the right to also use some other distributor?*

Mr. Hanger: *That was an exclusive territory relationship.* I think that you would fairly have to characterize that *only Mr. Scanlan would sell in this territory. . . . We tell him, 'This is your territory, and it is all yours.* You sell "X" cases of beer in this territory and you will make some money.' Apparently he did.

The Court: In return what does Scanlan say?

Mr. Hanger: Scanlan in return, for that matter in all cases, Scanlan has to get himself some trucks; he has to have warehouse space to house the beer; he gets some uniforms for his truck drivers. *There is a list of things* which undoubtedly will go in evidence in this case *which he is required to do,* and if he is not willing to do that, then, we go to Joe Onetta or somebody else, we find ourselves a distributor."

Needless to say, such admissions and concessions resulted from the consistent testimony of all participants in the contract negotiations. Petitioner, Elliott, Leadholm, and Barosso each testified to the concluding conference in the negotiations for the distributorship with an authorized representative of the brewery (Elliott) before, and as a condition to, the purchase of the beer distribution business, good will and physical equipment of the Barossos, their employment by petitioner, petitioner's purchase of trucks, expansion of his warehouse and cooling facilities, and acceptance of the exclusive distributorship for Budweiser and Michelob beers in San Joaquin County.

See petitioner's testimony on this subject matter (RT 126:6-156:23; 163:14-164:6; 289:2-295:25; and 316:5-25, *inter alia*).

A particular representation was that the brewery had no plans for introduction of Busch Bavarian beer in California (RT 151:19-153:9 and 322:21-325:7) to disturb petitioner's operation as contemplated.

The testimony respecting the concluding discussion in this conference (RT 149:12-150:1; 156:12-24; and 1325:17-25) may be partially quoted for convenience, namely:

> "Q. Mr. Scanlan, before the adjournment did Mr. Elliott or anyone else say anything about anything further to be done or discussed in connection with these proposals that had been under discussion that day?
>
> A. Yes, just start preparing myself for becoming the Anheuser-Busch wholesaler in the future.
>
> Q. Now, you did part with that understanding on your part?
>
> A. Yes, I did.
>
> Q. Was there any understanding stated by anyone present of any future meeting on this subject or anything further to be done to complete it?
>
> A. None that I recall." (RT 156:12-24)

It is, therefore, manifest that this jury could have found, reasonably, that petitioner had fully proved the contract he had alleged and, under law, petitioner was entitled to have his contract claims submitted to the jury.

By reason, alone, of the express admissions of (1) petitioner's purchase of the Barosso beer distribution business with the brewery's considered approval, (2) construction of warehouse and cooling unit, purchase of trucking, handling and other equipment as required by the brewery, (3) full and proper performance of his undertakings as a distributor and of all lawful requirements of him by the brewery as such distributor and the further admission that said distributorship was an exclusive distributorship within petitioner's exclusive territory with exclusive right of sale therein, petitioner's right to require continued performance by the brewery and to claim his damages upon the latter's wrongful repudiation of further performance on April 9, 1963, was fully proved.

The most recent California case, and one dealing with a beer distributor in similar circumstances, *Burgermeister etc. Corp. v. Bowman, supra,* 227 C.A.2d 274, 280, 38 Cal.Rptr. 597 (hearing denied), in which the Court affirmed the judgment on a plaintiff's verdict, the controlling rules of decision are stated as follows:

> "Assuming, without deciding, that Bowman had not promised to exert his best efforts to sell Burgermeister's beer or to take care of the territory, he had in fact done so for a period of 19 years, had provided a fleet of trucks, painting them with Burgermeister advertising, had contributed to the brewery's advertising fund, had built warehouse facilities and had enlarged his inventory beyond his winter needs, etc. *Such a contract is not merely an executory promise for a promise.* Professor Williston describes such a

contract as '*an exclusive option by which the manufacturer promises to deal through no others within the defined territory . . . so long as the dealer desires to handle his products.* . . . If there is sufficient consideration, *this option is clearly a contract and is so held.*' (4 Williston on Contracts (rev. ed.) § 1027a, p. 2850.) There was sufficient consideration given here."

See, also, the case of *Mangini v. Wolfschmidt, Ltd.*, 192 C.A.2d 64, 13 Cal.Rptr. 503, and the leading case in the Ninth Circuit, applying California substantive law and affirming a plaintiff's recovery, of

Kelly-Springfield Tire Co. v. Bobo, 4 F.2d 71, 73-74.

Under California law, such a distributor is an independent contractor and acquires a property right in the subject matter.

See,

Carey v. Kraft-Phenix Cheese Corp., 24 C.A. 2d 517, 524, 525, 75 P.2d 540.

namely:

"We are therefore of the opinion *the plaintiff in this case was not a mere agent of the defendants, which agency was subject to revocation, but, on the contrary,* it appears that *he held title to a property interest in the business of buying and selling Kraft products,* which he had a right to sell and convey. . . ."

It is thus established by proof—not only sufficient for submission of factual issues to the jury—but also for direction of the jury to find for petitioner on the

issues of liability upon the second, contract, cause of action.

Since all material facts necessary to recovery on the contract are established by express admission and by evidence—from both sides and by testimony of all participants without conflict—it would but stultify the discussion and needlessly expand this submission to further detail the evidence in proof of the instant contract claim and, it is respectfully submitted, the judgment should be reversed in this respect with directions to the District Court to direct a verdict on all issues of liability on the contract issues and to proceed to the trial of the issues of petitioner's damages upon his second cause of action.

See

Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051.

VII. THE PROPOSED OPINION OF THE COURT OF APPEALS MISCONCEIVES AND MISSTATES MATERIAL FACTS.

The opinion (appendix 3) states, at page vi, that petitioner had not purchased the "business or goodwill" of the Barosso partnership. The evidence, as a whole and as noted in subparts B and C of part VI hereof, demonstrates the error of this statement and the issue was clearly a fact issue for the jury.

The opinion (appendix 3) states, at page vi, ". . . Three letters were introduced in which appellant specifically acknowledged, *prior* to his assumption of the Budweiser-Michelob distributorship, that

this would be the relationship between the parties.", whereas the evidence is demonstrative (see part C of part VI hereof) that an agreement was negotiated at the Eden Motor Lodge and petitioner had purchased the Barossos' business, employed the Barossos and their employees, constructed his warehouse and cooling unit and purchased additional trucks, *prior* to receipt of the brewery's letter-postscript device. Secondly, two of the "three letters" were not addressed to respondent brewery, but to respondent Flanigan as an individual and related only to the subject of whether petitioner were in fact buying the "good will" of respondent brewer. The cases cited to the quoted misstatement (*Anheuser-Busch, Inc. v. Jefferson Distributing Co.*, 353 F.2d 956, and *Roehm Distributing Co. v. Burgermeister Brewing Co.*, 196 Cal.App.2d 678, 17 Cal.Rptr. 881), are inapposite inasmuch as *Jefferson* did not suggest that that distributor had ever negotiated an agreement with respondent brewery and was only a job-lot buyer without any continuing relationship or other consideration. Under California law the letter-postscript is illusory, without consideration and without validity as a contractual instrument. See:

Tunkl v. Regents of University of California, 60 C.2d 92, 32 Cal.Rptr. 33;

Bard v. Kent, 19 C.2d 449, 452, 122 P.2d 8;

Main Street etc. Co. v. L. A. Trac. Co., 129 C. 301, 305, 61 P. 937; and

Hancock Oil Co. v. McClellan, 135 C.A.2d 667, 669-70, 288 P.2d 39.

The ruling of the Court of Appeals on the point is directly contrary to the ruling of the same court in *Standard Oil Co. v. Perkins,* 347 F.2d 383-384. In *Roehm* a new contract was negotiated, new consideration given and the contractual instrument constituted a valid contract under state law.

The statement (appendix 3, page vii) that the confidential trade information acquired by the Barossos and transferred to petitioner and that subsequently acquired by Fred Barosso, as an employee of petitioner, "was certainly not confidential information", is contrary to the record and all California precedent (see in particular the references to the record and citation of authorities in subpart B, part VII hereof).

The opinion (appendix 3) states, at page vii, ". . . Thus appellant's loss of Budweiser and Michelob was not due to any *Walker*-type conspiracy to boycott competing beers", whereas the evidence was directly to the contrary, summarized and cited in subpart A of part VI hereof and quoted in controlling respects in abstracts of testimony of petitioner, Flanigan, Orosolini and Giahos (appendices 7, 8, 9 and 10). The case of *Ace Beer Distributors, Inc. v. Kohn Inc.,* 318 F.2d 283, 375 U.S. 922, cited to this latter misstatement on the evidence in this cause is equally inapposite. In *Ace* the judgment was upon the plaintiff's pleading—which contained no allegation of facts indicating any activities violative of the antitrust laws. Further, the *Ace* court particularly noted that that plaintiff's case did advance adequate claims of

breach of contract and unfair competition, as a common law tort, but held that such subject matter was without the jurisdiction of the federal courts under the Sherman and Clayton acts.

The opnion further states (appendix 3, page ix), ". . . There is a complete absence of evidence to establish a general conspiracy to create a 'tying' arrangement between appellee and its distributors", whereas the evidence summarized in subpart A, part VI hereof, supra, and particularly quoted in appendices 7, 8, 9 and 10, supports—if it does not compel—a finding to the contrary, the only causative event in this case was respondent brewer's attempt to tie its third brand to the distribution of its two established brands by the exclusion and discriminatory treatment of all beers "directly competitive" with its third, Busch Bavarian, brand.

It is patent that the fundamental fallacy of the foregoing statements in the proposed opinion and rationale of the Court of Appeals is that the Court of Appeals was, in fact, reviewing the judgment of the District Court as based upon findings of fact derived from the evidence. It is, thus, that the Court of Appeals has erroneously assumed a fact finding function and purported to approve the erroneous assumption of the fact finding function of the jury by the District Court. The factual issues have *not been tried* and remain to be tried to a jury as particularly reserved to petitioner by the Seventh Amendment to the Constitution of the United States,

Rule 38 (a), Federal Rules of Civil Procedure, and relevant acts of Congress.

The opinion (appendix 3, page vii) further states that petitioner "ultimately decided to take no chance . . . on Busch Bavarian . . .", whereas respondents' answer and the admitted facts set forth in the pretrial order, as well as all the testimony, are *explicit that respondents terminated the relationship and course of dealing* between petitioner and respondent brewery.

VIII. SUBMISSION UPON PETITIONER'S REQUEST THAT A WRIT OF CERTIORARI ISSUE TO THE COURT OF APPEALS.

Notwithstanding the supererogatory efforts of the Court to guide the District Courts and the Courts of Appeals in the enforcement of the acts of the Congress proscribing "business" conduct violative of principles of fair competition in business, it appears these lessons have not been learned and this private litigant must seek review of the unsupported and erroneous judgment proposed by the Court of Appeals.

In this regard, it may be noted that recent and controlling rulings in this field of litigation eminated from the Ninth Circuit, namely:

Case-Swayne v. Sunkist Growers, Inc., 369 F.2d 449;

Simpson v. Union Oil Company of California, 377 U.S. 13, 12 L.ed.2d 98;

Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 3 L.ed.2d 741, 79 S.Ct. 705,

in each of which the Court was required to reverse the judgment of the Court of Appeals and correct the underlying judgments of the respective District Courts. Since redress has been herein denied, it is necessary that another injured litigant appeal to the discretion of a busy Court.

Fortunately, the disregard of jurisdiction, statute and rule of decision is here manifest and need not tax the Court with the breaking of new ground.

Except as to the fourth claim invoking Sherman Act principles, the courts below never acquired jurisdiction and the cause, as removed, which was required to be remanded upon petitioner's motion for an order remanding the cause to the state court from which it was erroneously removed.

In all events, the order directing a defendants' verdict was without jurisdiction and void, as unsupported and violative of Rule 50, Rules of Civil Procedure, and proceeded upon the explicit fallacy that the judge presiding was the finder of the facts.

Finally, and assuming jurisdiction, the judgment of the Court of Appeals in proposing to affirm the judgment of dismissal of the District Court is clear error—without evidence and contrary to the admissions and overwhelming proof of each issue of fact necessary to petitioner's recovery upon each of his claims in accordance with relevant and controlling rules of decision.

It is respectfully submitted that justice to this petitioner and public considerations of probity in

judicial administration in the courts of the United States, herein more than usually, impel the granting of review of the erroneous judgment herein proposed by the Court of Appeals.

Dated, San Francisco, California,
April 3, 1968.

Respectfully submitted,
J. ALBERT HUTCHINSON,
Attorney for Petitioner.

(Appendices Follow)